IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 17, 2007 Session

STATE OF TENNESSEE v. MICHAEL CASPER

Appeal from the Circuit Court for Rutherford County
No. F-58029A Don R. Ash, Judge

No. M2006-02538-CCA-R3-CD - Filed July 3, 2008

Appellant, Michael Casper, was indicted by a Rutherford County Grand Jury for nineteen counts of sale of securities by an unregistered broker-dealer or agent in violation of Tennessee Code Annotated section 48-2-109. Prior to trial, the State dismissed counts twelve, thirteen and seventeen of the indictment. At the conclusion of the State's proof at trial, the trial court dismissed count fourteen of the indictment for lack of evidence. At the conclusion of the proof, the jury found Appellant guilty of the remaining fifteen counts of the indictment. The trial court sentenced Appellant to four years as a Range I, standard offender on each count, with three sentences to run consecutively to each other. The trial court suspended the sentences after the service of eleven months in incarceration and ordered Appellant to spend twelve years on probation. Appellant received a $500 fine for each conviction. In addition, he was ordered to complete 1,000 hours of community service and pay restitution to the victims in the amount of $136,000. The trial court denied a motion for new trial, and Appellant appealed. On appeal, Appellant contends that: (1) the trial court improperly permitted the State to introduce an Agreed Order from an administrative proceeding between Appellant and the Department of Commerce and Insurance in which Appellant agreed to cease and desist the sales of securities; (2) the State failed to properly establish venue in Rutherford County in thirteen of the fifteen counts; (3) the evidence is insufficient to support the convictions; (4) the trial court erred by sentencing Appellant to incarceration because he did not willfully violate Tennessee Code Annotated section 48-2-109; and (5) the trial court should have corrected the judgment to reflect that Appellant was to serve eleven months of the sentence in the Rutherford County Jail as a Range I, standard offender with a thirty percent release eligibility date. We affirm the trial court's decision to admit the Agreed Order into evidence and conclude that the State properly proved venue at trial. However, because the evidence is insufficient to prove that Appellant willfully violated Tennessee Code Annotated section 48-2-109, we reverse and dismiss Appellant's convictions.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Trial Court are Reversed and Dismissed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Ernest W. Williams, Nashville, Tennessee, for appellant, Michael Casper.

Robert E. Cooper, Jr., Attorney General & Reporter; Elizabeth B. Marney, Assistant Attorney General, and William C. Whitesell, Jr., District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In 2003, the Department of Commerce and Insurance opened an investigation into the sale of PhyMed Partners, Inc. ("PhyMed") convertible preferred stock by a business named Olde South Trust that was located in Murfreesboro, Tennessee, and owned by Appellant. The investigation began after the Securities Division of the Department of Commerce and Insurance received various complaints from individuals who invested in PhyMed convertible preferred stock through Olde South Trust. PhyMed was a Florida Company that purported to use investors' money to build pain clinics. The PhyMed investors in Tennessee claimed that they had stopped receiving dividend payments from PhyMed. The matter was referred to the Department of Commerce and Insurance because the people working for Olde South Trust had insurance licenses.

According to Robert Heisse, a securities examiner for the Department of Commerce and Insurance, the investigation into Olde South Trust determined that PhyMed stock was being sold by the company to a large number of senior citizens throughout the state of Tennessee.[1] Olde South Trust usually held seminars at churches or gathering places for senior citizens in order to give people information about living trusts and estate planning. At the conclusion of the seminars, people who were interested in learning more information could sign up on a sheet indicating their interests. Afterwards, a representative from Olde South Trust would visit the individuals in their homes. The representative would learn all about the assets of the individual and would suggest that the individual could make more money if they would invest in another product, such as PhyMed convertible preferred stock.[2] The investors signed documents regarding their investments, and Olde South Trust mailed the documents and investment capital to PhyMed in exchange for a finder's fee.

At the conclusion of the investigation, Appellant entered into an Agreed Order with the Department of Commerce and Insurance. In that order, Appellant admitted that he had engaged in the offer and sale of unregistered securities, namely preferred stock issued by PhyMed Partners,

[1] According to Mr. Heisse, Olde South Trust was not registered as a regulated trust company with the Department of Commerce and Insurance.

[2] The preferred stock was actually a debt security. Although PhyMed referred to the earnings from the preferred stock as dividends, PhyMed was actually selling what it called a convertible preferred stock with an interest rate return of approximately twelve to thirteen-and-a-half percent, depending on the frequency of the payout.

without being registered by the State of Tennessee as a broker-dealer or agent of a broker-dealer. As a result of the Agreed Order, Appellant surrendered his insurance license. Appellant also agreed to cooperate with the State to provide information about another individual who was under investigation at the time.

According to Mr. Heisse, Appellant met with him on a few occasions prior to the entry of the Agreed Order. In those meetings, Appellant indicated that he did not know that he was selling securities. Appellant thought that the PhyMed preferred stock was being sold under Regulation D 506, a securities registration exemption under federal law. Mr. Heisse explained that when Appellant entered into the Agreed Order with the Department of Commerce and Insurance, Appellant believed that he was permitted under law to be paid finder's fees by PhyMed on the sale of the PhyMed preferred stock.

Mr. Heisse testified at trial that in the year 2000, the Department of Commerce and Insurance issued a cease and desist order against Middle Tennessee Trust, another company owned by Appellant. In that order, Appellant was notified that the sale of unregistered securities in the form of a viatical settlement[3] was illegal. There was also an investigation by the Department of Commerce and Insurance in 2000 involving Appellant and Olde South Trust regarding the sale of PhyMed promissory notes. That investigation resulted in a petition for a cease and desist order. It is unclear from Mr. Heisse's testimony if the petition was ever granted. The testimony of Mr. Heisse indicates that Olde South Trust ceased selling PhyMed promissory notes after the 2000 investigation and began selling the preferred stock of PhyMed.

Mr. Heisse stated that PhyMed was eventually shut down by federal authorities after a joint investigation with the Florida Department of Financial Investigations. In conjunction with that investigation, James Lamar McMichael, the president and CEO of PhyMed, pled guilty to securities fraud and was awaiting sentencing at the time of Appellant's trial.

Larry Burton of the Securities Division of the Department of Commerce and Insurance testified at trial that neither Olde South Trust nor Appellant were registered in Tennessee under the Securities Act as a broker-dealer or agent. However, Mr. Burton explained that trust companies are characterized as "Institutional Investors" in Tennessee. Institutional Investors as a group are excluded from the definition of broker-dealers. In other words, employees and agents of trust companies or Institutional Investors that are operating in a lawful manner are exempt from registration requirements.

Cora Alston of the Department of Commerce and Insurance explained that the most common types of securities are stocks, bonds, divestures, investment certificates, partnerships, preferred stocks, investment certificates, fractional interests in oil and gas, and mineral rights. Ms. Alston is

[3] A viatical is an investment contract wherein an individual invests either an entire life insurance policy or a portion of a life insurance policy held by an individual where the individual insured has contracted with a company to receive the cash payout before his/her death.

the Chief of Security Regulations in the Securities Division of the Department of Commerce and Insurance. In Tennessee, if a person wants to sell stock, they must register that stock with the securities division in order to protect investors. Ms. Alston informed the trial court that there was a "notice of filing" filed with the securities division for PhyMed in 2000 and in 2001. A "notice of filing" is not a registration or an exemption. According to Ms. Alston, a "notice of filing" is filed by the issuer of the stock to notify the state that it intends to sell that security. A "notice of filing" is required to be submitted to the division within fifteen days after the first sale. The sale of a Regulation D 506 security would come under a notice of filing. Ms. Alston described a Regulation D 506 as an offering that is sold to potential investors that have some degree of sophistication. An agent selling a Regulation D 506 security does not have to be registered in the State of Tennessee as a broker-dealer or agent. In 2000 and 2001, Olde South Trust was selling PhyMed preferred stock as a Regulation D 506 offering.

Walter "Bucky" Phillips worked for Appellant at Olde South Trust in their offices on West Main Street in Murfreesboro, Tennessee for approximately five years. Mr. Phillips had an insurance license. Mr. Phillips explained that Olde South Trust held seminars at churches, targeting senior citizens. The seminars were usually led by Appellant and concentrated on estate planning. During his employment at Olde South Trust, Mr. Phillips described his job as follows:

> Initially my duties - - well, my duties fell into two categories. Front end and back end. Front end is where we all started. Front end our responsibilities were in regard to going into a home where a lead had come that someone wanted to talk to us about estate planning. We would talk to them. Comparing wills and trusts and so forth and how they worked. Depending upon what the client determined they wanted to do after we explained how trusts worked . . . we'd take their applications and check, take that back to the office. And then it went from there to an attorney. That's what the front end people did. As we moved on as we developed as front end people if we wanted to move then to back end work, the back end people were the ones who after a trust was finished by the attorney and was given to those of us who worked on the back end we would take the trust to the home of that client. And we, depending upon how involved their estate was, we would make how ever many trips necessary to go through the trusts, have everything signed by the clients. We would notarize everything for them. We would fund the trust. In other words move all of their assets into the trust for them. If they had monies to be invested and wanted to do so in this case with PhyMed we would help them make those transfers by virtue of filling out the application, helping the client fill out that application and again taking their check which was made out to PhyMed. Take that and turn that again into Olde South's office.

According to Mr. Phillips, Olde South Trust was Appellant's company, and Appellant made the decisions on how things were accomplished with the investments. Mr. Phillips was paid commissions on his sales from Olde South Trust. Appellant instructed Mr. Phillips to begin selling PhyMed preferred stock. Mr. Phillips told his clients that they would realize at least a twelve percent

and sometimes even higher return on their investment in PhyMed. Mr. Phillips was under the impression that he could legally sell PhyMed preferred stock and get paid a finder's fee.

When questioned at trial, Mr. Phillips admitted to selling PhyMed stock to many of the victims. Mr. Phillips also stated that his own mother invested in PhyMed and recalled that Appellant's parents had purchased PhyMed investments as well. Sometime during his employment with Olde South Trust, Mr. Phillips was sent to Kansas City to prepare for an exam to qualify for his securities license. After taking this exam, Mr. Phillips could only sell items that were on the preferred list of his broker-dealer or fixed annuities. Mr. Phillips testified that he did not sell PhyMed stock after taking this exam because PhyMed was not on the preferred list of his broker-dealer.

Mr. Phillips recalled that in the spring and early summer of 2002, the PhyMed dividend checks started arriving "later and later" to the investors. According to Mr. Phillips, Appellant instructed the employees of Olde South Trust to sell as much PhyMed as possible to avoid having PhyMed "go under."

At the conclusion of his testimony, Mr. Phillips admitted that he had been named in the indictment, but that he had reached an agreement with the State wherein he would receive diversion if he agreed to testify truthfully at Appellant's trial. At the time of trial, Mr. Phillips had surrendered his insurance license for the State of Tennessee and other states, including Arizona, Georgia, North Carolina and possibly Kentucky.

Joyce Dutton, another employee of Olde South Trust, testified at trial. Ms. Dutton worked for Olde South Trust from 1998 to 2001. At the time of trial, she was under investigation by the Department of Commerce and Insurance for selling securities without a license.

Ms. Dutton met Appellant when she was a church secretary at Third Baptist Church in Murfreesboro, Tennessee. Appellant offered her a job at Olde South Trust in August of 1998. Ms. Dutton described the business purpose of Olde South Trust as selling trusts, investments and annuities to people. In August of 1998, Olde South Trust employed Michael Verble, Bucky Phillips, Ray Mercer, John Pinfield, Appellant and Appellant's father. Appellant was the owner and operator of the business and was responsible for making monetary decisions, including determining what amount of money each person would be paid for their work. When Ms. Dutton first started working at Olde South Trust, she answered the phone and set up seminars and files. Later on, she undertook bookkeeping responsibilities, wrote correspondence, talked with clients, paid bills and wrote payroll checks.

Ms. Dutton described the process that took place at Olde South Trust when a new client was acquired. The money was received by Olde South Trust and sent to PhyMed. Ms. Dutton made copies of the paperwork involved in the transfer or sale and posted all the information about the sale in a ledger. The ledger listed the date of the sale, the name of the client, the amount of the sale, and who made the sale. According to Ms. Dutton, PhyMed paid Olde South Trust fourteen percent of

each sale. When a commission payment came in from PhyMed, Ms. Dutton posted it in the ledger, noting the date of the investment, the amount of the investment, the date the investment paperwork went to PhyMed, the investor's name, and the consultant responsible for the sale. Ms. Dutton thought that Appellant set aside between six and eight percent of the commission money for himself.

Ms. Dutton sold some PhyMed preferred stock to her family and a few friends. She and her husband even invested in PhyMed. Ms. Dutton received a commission from the sale of PhyMed stock, but Appellant instructed her to make the commission payable to her husband because he did not want anyone else to know that she received a commission. There were no problems with PhyMed while Ms. Dutton was employed at Olde South Trust, and she did not think that she was doing anything illegal by selling PhyMed stock.

Julie Pyatt worked at Olde South Trust from October of 2001 through September of 2002 as the bookkeeper. Ms. Pyatt was in charge of accounts receivable, accounts payable and monthly financial statements, as well as, year-end W2 and 1099 forms. Ms. Pyatt kept track of investment sales with an accounting system. She kept records of when sales were made and who made the sales. Therefore, she could pay the proper commissions on the sales when the commission checks came in from PhyMed. When a commission check came in, a certain percentage went to the consultant who made the sale, another percentage went to Appellant, and another percentage went to Michael Verble. The commission percentages paid to Appellant were made payable to Stevens Consulting, a business Appellant opened to hold all of his income and pay all of his expenses associated with "consulting" work. Appellant was, in turn, paid by Stevens Consulting rather than directly by Olde South Trust.

Several of the people that invested in PhyMed through Olde South Trust testified at trial. The majority of the individual investors testified that they attended local seminars sponsored by Olde South Trust. After attending the seminars, the individual investors were visited at their homes by an employee of Olde South Trust, where they were convinced to invest in PhyMed after being promised a high rate of return. The paperwork was almost exclusively executed in the individual investors' homes but was processed in the offices of Olde South Trust in Murfreesboro. Larry Wayne Cross actually came to the offices of Olde South Trust to inquire about PhyMed. William Beachboard and his wife, along with Dorothy Bingham, testified at trial that they were residents of Rutherford County who invested in PhyMed through Olde South Trust. The other investors that testified at trial were residents of Davidson County, Wilson County, Lawrence County, Carter County, and Washington County, Tennessee.

Appellant chose not to testify at trial, but presented the testimony of his father, Phillip Casper. Mr. Casper lives in Pearl River, Louisiana. Mr. Casper was briefly employed by Olde South Trust and testified that Michael Verble was the chief operating officer of the company. Mr. Casper and his wife invested in PhyMed in 2001.

Analysis
Introduction of Agreed Order

First, Appellant contends that the trial court improperly allowed the State to introduce an Agreed Order between Appellant and the Tennessee Department of Commerce and Insurance wherein Appellant admitted that he had engaged in the offer and sale of unregistered securities without being registered as a broker-dealer or an agent of a broker-dealer. Appellant argues that the Agreed Order was entered into as part of a civil proceeding that requires a different burden of proof than a criminal proceeding. Appellant complains that "all a jury member would have to do is take this Agreed Order that has been entered into in a civil proceeding and lay it beside the indictment [to compare the language] and it would appear that [Appellant] agreed that he has committed this criminal act." Secondly, Appellant complains that the Agreed Order amounts to a confession and was admitted into evidence in violation of the Fifth Amendment of the United States Constitution and *Miranda v. Arizona*, 384 U.S. 436 (1966). The State contends, on the other hand, that the trial court correctly denied the objection to the admission of the Agreed Order into evidence.

At trial, the issue of the admissibility of the Agreed Order came about during the direct testimony of Mr. Heisse. The State attempted to introduce the Agreed Order and counsel for Appellant objected. Counsel for Appellant argued to the trial court that although Appellant signed the Agreed Order in which he admitted that he had engaged in the offer and sale of unregistered securities without being registered as a broker-dealer or an agent of a broker-dealer, the order should be inadmissible because the civil proceeding had a different burden of proof and introduction of the order was highly prejudicial. The trial court overruled the objection and ruled that the order was admissible and relevant.

The order states, in pertinent part, as follows:

> 9. [Appellant] engaged in the offer and sale of unregistered securities, to wit preferred stock issued by PhyMed Partners, Inc., in this State without being registered as a broker-dealer or an agent of a broker-dealer.
>
> . . . .
>
> 13. Based upon the Findings of Fact cited above and the Conclusions of Law contained herein, the commissioner considers the actions of [Appellant] to be in violation of Tennessee Code Annotated §§ 48-2-104 and 48-2-109 . . . .
>
> 14. [Appellant] hereby admits to the Findings of Fact stated above . . . .

We conclude that the trial court did not abuse its discretion in admitting the Agreed Order into evidence. In order to be admissible, evidence must be relevant and probative to an issue at trial. *State v. McCary*, 922 S.W.2d 511, 514 (Tenn. 1996); *see also* Tenn. R. Evid. 402. Evidence is

relevant if is has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant evidence may be excluded at trial if the probative value of that evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Tenn. R. Evid. 403. The determination of relevancy is left to the discretion of the trial court, and this Court will not overturn a trial court's determination in this regard in the absence of an abuse of discretion. *State v. Forbes*, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995). The order at issue herein was certainly relevant to the proceedings at trial and the admissions made by Appellant in the Agreed Order are not unfairly prejudicial. There is no evidence that the Agreed Order was coerced or was in anyway involuntary. Moreover, we note that the order only reflects that Appellant was selling securities without proper registration, not that he was "willfully" doing so. Indeed, Mr. Heisse testified that Appellant told him he thought he was exempt from the registration requirement.

Further, Appellant's argument that the admission of the agreed order into evidence was somehow tantamount to an admission under *Miranda v. Arizona*, 384 U.S. 436 (1966), does not entitle Appellant to relief. Appellant raises this issue for the first time on appeal. It is well-settled that a defendant cannot change theories for objecting to an evidentiary ruling between the trial court and the appellate court. *State v. Brewer*, 932 S.W.2d 1, 9 (Tenn. Crim. App. 1996) (citing *State v. Banes*, 874 S.w.2d 73, 82 (Tenn. Crim App. 1993)). This constitutes waiver. *Id.* (citing *State v. Gregory*, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993)). Furthermore, *Miranda* only applies to custodial interrogations, and there is no evidence that the agreed order was the product of such. *See State v. Cooper*, 912 S.W.2d 756, 759 (Tenn. Crim. App. 1995) Appellant is not entitled to relief on this issue.

Venue

Next, Appellant contends that the State failed to prove venue by a preponderance of the evidence. Specifically, Appellant argues that venue was not established because only two of the transactions at issue were either "commenced" or "consummated" in Rutherford County at the residence of the investors and that the remainder of the transactions took place outside Rutherford County. In other words, Appellant contends that the State failed to prove venue in thirteen of the fifteen counts at issue. The State, on the other hand, asserts that Appellant's argument is without merit because the offenses of transacting business in violation of Tennessee Code Annotated section 48-2-109 were commenced or consummated in Rutherford County because Appellant's business was located in Rutherford County.

Proof of venue is necessary to establish the trial court's jurisdiction. *See Harvey v. State*, 376 S.W.2d 497, 498 (Tenn. 1964); *Hopson v. State*, 299 S.W.2d 11, 14 (Tenn. 1957). "Venue is a question for the jury, and can be established by circumstantial evidence." *State v. Young*, 196 S.W.3d 85, 101-02 (Tenn. 2006) (citing *State v. Hamsley*, 672 S.W.2d 437, 439 (Tenn. Crim. App. 1984); *State v. Bennett*, 549 S.W.2d 949, 950 (Tenn. 1977)). To determine venue, the jury is permitted to draw reasonable inferences based on the evidence presented. *Id.* at 102 (citing *State v.*

Johnson, 673 S.W.2d 877, 882 (Tenn. Crim. App. 1984)). The State only needs to prove by a preponderance of the evidence that the charged offense was committed in the county in which the defendant is being tried. *See* T.C.A. § 39-11-201(e); *Bennett*, 549 S.W.2d at 949-50; *State v. Anderson*, 985 S.W.2d 9, 15 (Tenn. Crim. App. 1997). Where different elements of the same offense are committed in different counties, "the offense may be prosecuted in either county." Tenn. R. Crim. P. 18(b).

Viewing the evidence presented at trial, we conclude that there was ample evidence from which the jury could determine that venue was proper in Rutherford County. While not all of the victims resided in Rutherford County, all of the paperwork memorializing their agreements with Olde South Trust in which they agreed to purchase PhyMed preferred stock was processed through and in the office of Olde South Trust in Rutherford County. Therefore, an integral element of the sale of the securities to residents of other counties occurred in Rutherford County and venue was proper in that county.

Sufficiency of the Evidence

Next, Appellant claims that the evidence was insufficient to support the convictions. Specifically, Appellant argues that the evidence was insufficient to support the convictions because he did not willfully violate Tennessee Code Annotated section 48-2-109. To support his argument, Appellant states that "the entire proof in this case shows that [Appellant] and his agents were acting in selling in what they believe to be a lawful manner" and that "when they were notified that they were acting improperly, they ceased such actions." Thus, Appellant argues that the proof fails to show that he acted "willfully." The State contends that the evidence supporting Appellant's guilt is "overwhelming" and that the jury made the decision that Appellant willfully violated the law.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S .W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions of

witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

Appellant was charged with violating Tennessee Code Annotated section 48-2-109. Tennessee Code Annotated section 48-2-109 makes it "unlawful for any person to transact business from or in this state as a broker-dealer or agent unless such person is registered as a broker-dealer or agent under this part." A violation of Tennessee Code Annotated section 48-2-109 in and of itself is not punishable as a crime. However, Tennessee Code Annotated section 48-2-123(a) mandates punishment as a class D felony for any person who "*willfully violates* any provision of this part or who *willfully violates* any rule or order under this part" (emphasis added). The statute also prescribes that "no person may be imprisoned for the violation of any rule or order if the person proves that the person had no actual knowledge of the rule or order." *Id.*

In determining the sufficiency of the evidence supporting Appellant's criminal convictions we must address two issues. First, we must determine the legislative intent in its use of the language "willfully violated" in Tennessee Code Annotated section 48-2-123(a) to criminalize sales of securities made in violation of Tennessee Code Annotated section 48-2-109. Once that question is answered we must then determine whether there is evidence in the record to show beyond a reasonable doubt that in selling securities Appellant acted "willfully" within the meaning of Tennessee Code Annotated section 48-2-123(a).

We begin our analysis by noting that the term "willful" or "willfully" is not defined in the Tennessee Securities Act of 1980, Tennessee Code Annotated section 48-2-101, et seq.[4] Therefore, we must look to case law to assist us in determining legislative intent in that body's use of the term "willfully." In doing so we recognize that courts must avoid construing a statute in a manner that unduly expands or restricts the statute's application. *State v. Davis*, 940 S.W.2d 558, 561 (Tenn. 1997); *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

In recent years the United States Supreme court has decided two cases requiring divination of congressional intent in the use of the term "willfully" to criminalize conduct in complex federal regulatory schemes. In the first of these cases, *Cheek v. U.S.*, 498 U.S. 192 (1991), the Court was faced with determining whether the defendant had "willfully" failed to pay his federal income tax. While noting the venerable common law principle that ignorance or mistake of law is ordinarily no defense to a crime, the Court found that Congress had softened the impact of this doctrine by only criminalizing the willful failure to pay the tax. *Id*. at 199-200. Recognizing the complexity of the federal tax laws the Court stated: "Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Id*. at 201.

[4]This stands in stark contrast to the detailed definitions of culpable mental states set out applicable to crimes codified under the general criminal code. *See* T.C.A. § 39-11-302.

In the second case, *Ratzlaf v. U.S.*, 510 U.S. 135 (1994), the defendant was convicted of willfully structuring a financial transaction, in this case depositing sums of cash under $10,000 in a number of banks, in an effort to avoid having the banks report the deposits to the federal government as required by 31 United States Code § 5313(a). 31 United States Code § 5324, the so-called anti-structuring provision, prohibited activity such as that undertaken by the defendant in that case. However, only willful violations of the anti-structuring law were punishable as criminal offenses. *See* 31 U.S.C. § 5322; *Ratzlaf*, 510 U.S. at 140. The Court again recognized that typically ignorance or mistake of law was no defense. *Id*. at 149. However, as in *Cheek,* the Court held that in its use of the specific intent element of "willfulness" to criminalize the conduct in question, Congress intended that only individuals who know that their conduct is illegal and nevertheless intentionally violate the law may be criminally convicted of violating the anti-structuring laws. *Id*.

With *Cheek* and *Ratzlaf* in mind we note that our state securities act creates two distinct classes of violators of the provisions of the security laws that require certain persons who sell securities to be registered. The first class involves people who sell securities without being registered, but who do so in a way that does not willfully violate the statute. Those individuals are subject only to civil penalties up to $10,000 per violation. T.C.A. § 48-2-109(e). The second class involves persons who "willfully violate" the provisions of section 48-2-109. Those persons are subject to criminal penalties as well as civil penalties. *Id*.; T.C.A. § 48-2-123(a). Given the creation of these two distinct classes of offenders, we believe the legislature must have intended that "willfully violate" means something more than simply intentionally selling securities without properly registering as a broker-dealer under section 48-2-109. As was the Supreme Court in *Ratzlaf*, we are persuaded that this distinction between criminal and non-criminal offenders means that the legislature intended only to criminalize the selling of securities by an unregistered broker-dealer when the person selling the securities is aware that his or her conduct is prohibited by Tennessee Code Annotated section 48-2-109, and yet nevertheless intentionally sells the security knowing he or she is violating the law. This conclusion is reinforced by the *Cheek* decision discussed *supra*, wherein the Court interpreted the use of the specific intent of "willful" in criminalizing conduct falling under complex regulatory schemes, such as our state securities act, as demonstrative of legislative intent to convict only individuals who know their conduct is prohibited by law.[5]

Turning to the facts of the case herein it appears that all of the counts of the indictment for which Appellant was convicted involve sales of securities prior to the entry of the Agreed Order on March 15, 2005, wherein Appellant agreed to cease and desist selling PhyMed preferred stock. According to the testimony, Appellant complied with that order. The testimony reflects that prior to being informed by the Department of Commerce and Insurance that he was required to register as a broker-dealer to sell these securities, Appellant believed he was exempt under federal law from

[5] Further buttressing our conclusion is our state supreme court's interpretation of the term "willful misconduct" by an injured employee in the context of a bar to a workers' compensation recovery. The supreme court has held that in order to be "willful misconduct" the employee misconduct must be in violation of "known and understood" workplace prohibitions. *See Nance v. State Indust., Inc.*, 33 S.W.3d 222, 227 (Tenn. 2000); *Wright v. Gunther Nash Min. Const. Co.*, 614 S.W.2d 796, 798 (Tenn. 1981).

the registration requirement. Ms. Cora Alston of the Department of Commerce and Insurance testified that Olde South Trust did indeed file a "notice of filing" which is sufficient to sell securities without registering as a broker-dealer under state law if the seller is truly exempt under federal Regulation D 506 as Appellant believed. State securities examiners even met with an individual whom they had no reason to doubt was a securities attorney who advised Appellant concerning the procedure under which PhyMed preferred stock could be sold.[6]

The only evidence adduced by the State to show that Appellant knew his actions were illegal was testimony that in sales involving viaticals unrelated to the securities, in this case Appellant had been ordered by Commerce and Insurance in the year 2000 to cease sales involving viaticals without proper registration. However, Ms. Alston testified that there are a myriad of securities for which the sale of some require registration of the seller with the State, while the sale of others do not. Given the complexities of the state and federal securities laws, and the interplay between the two, the knowledge that selling one type of security is forbidden does not translate into complete omniscience regarding these laws.

In short, the Court is of the opinion that the State failed to carry its burden of proving beyond a reasonable doubt that Appellant knew, prior to his agreement to stop selling PhyMed preferred stock, that his actions were illegal and nevertheless continued selling the securities. In other words, the Court believes there is insufficient evidence to prove that Appellant acted "willfully" and therefore criminally under Tennessee Code Annotated section 48-2-123(a). Therefore, Appellant's criminal convictions must be reversed and dismissed.

Sentencing

Appellant contends that his sentence to incarceration is improper because Tennessee Code Annotated section 48-2-123(a) provides in part that: "No person may be imprisoned for a violation of any rule or order if the person proves that the person had no actual knowledge of the rule or order." While the Court's holding with regard to the sufficiency of the evidence renders any argument on this point largely moot, we do note that Appellant was convicted of violating Tennessee Code Annotated section 48-2-109(a), which requires registration as a broker-dealer with the Tennessee Department of Commerce and Insurance in order to sell various types of securities. He was not convicted of violating an administrative rule or order promulgated by the commissioner of

[6] This Court is certainly aware of the case of *State v. Brewer*, 932 S.W.2d 1 (Tenn. Crim. App. 1996), wherein this Court held in a prosecution for securities fraud that acting on advice of counsel is not *per se* a defense to a charge of violating the state securities act. *Id*. at 17. However, the question of whether the defendant in *Brewer* acted "willfully" was not discussed. While reliance on advice of counsel is not in and of itself a defense to a prosecution under the state securities laws, it can be part of the evidentiary tapestry that depicts whether a defendant acted "willfully." Moreover, the Tennessee Supreme Court case on which *Brewer* rests for its holding that advice of counsel is not a defense to a securities fraud prosecution is *Hunter v. State*, 158 Tenn. 63, 69 12 S.W.2d 361, 362 (1928), which held that advice of counsel was not a defense to the then existing embezzlement statute which did not have a specific *mens rea* element. For these reasons, both *Hunter* and *Brewer* are inapposite to the case at bar.

Commerce and Insurance. Thus, the language of Tennessee Code Annotated section 48-2-123(a) on which Appellant relies has no application to his case.

Conclusion

In light of the foregoing, the criminal convictions for willfully violating Tennessee Code Annotated section 48-2-109(a) are reversed and dismissed for insufficient evidence. The case is remanded to the Circuit Court of Rutherford County for collection of costs and any other proceedings that may be necessary.

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JERRY L. SMITH, JUDGE